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In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, EX REL. LEE KUM HOY, LEE KUM CHERK, AND LEE MOON WAH, *Petitioners*

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	12
Conclusion	16

CITATIONS

CASES:

Beach v. *Beach*, 114 F. 2d 479	14, 15
Berkman v. *Tillinghast*, 58 F. 2d 621	14
Chew Deck, United States ex rel. v. *Commissioner*, 17 F. Supp. 78, affirmed, 86 F. 2d 1020, certiorari denied, 300 U.S. 666	15
Dong Wing Ott v. *Shaughnessy*, 220 F. 2d 537, certiorari denied, 350 U.S. 847	13, 14
Eagles v. *United States*, 329 U.S. 304	15
F.C.C. v. *Pottsville Broadcasting Co.*, 309 U.S. 134	15
Gung You v. *Nagle*, 34 F. 2d 848	14
Jung Yen Loy v. *Cahill*, 81 F. 2d 809	14
Kwong Han Foo v. *Ward*, 126 F. 2d 615	14, 15
Lee Fan, In the Matter of (0300/423162, February 25, 1953)	14
Lee Wing You, Mason ex rel. v. *Tillinghast*, 27 F. 2d 580	14
Lue Chow Kon v. *Brownell*, 220 F. 2d 187	13, 14, 15
National Labor Relations Board v. *Jones & Laughlin Corp.*, 301 U.S. 1	12
Sunal v. *Large*, 332 U.S. 174	15
Wong Fuey Ying v. *Dulles*, 137 F. Supp. 470	15

MISCELLANEOUS:

Rule 35, F.R.C.P.	14
Civil Practice Act of New York	14

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OPINIONS BELOW

The opinions of the Court of Appeals (Pet. 1a-16a) are not yet reported. The opinions of the District Court (R. 70, 55, 36) are reported at 133 F. Supp. 850, 123 F. Supp. 674, and 115 F. Supp. 302, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1956. The petition for a writ of certiorari was filed on November 2, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were unreasonably discriminated against when, during an investigation of their applications for entry into this country under claim of derivative citizenship through a citizen father, they were given blood tests.

2. Whether the court below correctly held that the lack of specific statute or regulation did not preclude administrative investigators of the Immigration and Naturalization Service from requesting that such blood tests be given petitioners, where, although they had the burden of establishing their claim to citizenship, they were unable to produce any competent documentary evidence in support of their claim.

3. Whether, on collateral attack by habeas corpus, the weight of the evidence obtained from blood tests can be considered.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals reversing the order of the District Court which had granted a writ of habeas corpus and admitted petitioners to the United States as citizens (R. 115-116).

The evidence and the proceedings in this case may be summarized as follows:

On June 17, 1952, the petitioners, two boys and a girl aged 21, 13, and 12 respectively, arrived in New York from Hong Kong (R. 131, 148, 149). The three claimed to be the children of Lee Ha (an American citizen) and his wife Wong Tew Hee* (an alien), to whom the alleged father was married in China in 1923 (R. 149).

The case was referred to a Board of Special Inquiry and a hearing was commenced on August 14, 1952 (R. 123). Petitioners, who were represented by counsel, were informed that the burden was upon them to establish that they were admissible (R. 124). They testified that they were born in Toishan District of China (R. 125), and that they had never before been in the United States (R. 131). Lee Ha, the claimed citizen father, and Wong Tew Hee,* the alleged mother, testified in support of their claimed relationship to the children and to each other (R. 134, 136). The petitioners and the alleged parents were questioned in detail as to their alleged common home in Lung Woy Village, Toishan District, China (R. 126-130, 134-135, 137).

The immigration inspector introduced into evidence the results of two blood tests taken of the three petitioners and the alleged parents by the United States Public Health Service on two occasions prior to the hearing (R. 131-133, 135, 136). The tests showed that

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* Also variously referred to in the proceedings as Tew Hee Wong and Hee Tew Wong.

each of the claimed parents was in blood group "A", while Lee Moon Wah, and Lee Kum Hoy were in blood group "B", and Lee Kum Cherk was in blood group "O" (R. 150). The Service inspector also introduced into evidence an article in the United States Law Review entitled "Blood Grouping Tests in the New York Courts" by Alexander S. Wiener, M.D. (R. 137) from which it appeared that, on the basis of the blood test results, the petitioners Lee Moon Wah and Lee Kum Hoy could not be related to the claimed parents (R. 137, 150). Petitioners' counsel objected to the introduction into evidence of both the blood test results and the article by Dr. Wiener (R. 133, 140). A request that Dr. Wiener be produced for cross-examination was denied (R. 140).

Petitioners were, however, granted a continuance until September 18, 1952, in order that they might have independent blood tests made to meet the evidence adduced by the Service (R. 140-141). On that date petitioners' counsel withdrew his request for independent blood tests and reiterated his request to cross-examine Dr. Wiener which request was again denied (R. 143-144).

The Board then rendered its exclusion order, finding *inter alia* that while the oral testimony of the witnesses as to their claimed common home in China was "reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service", the blood tests excluded the possibility that Lee Moon Wah and Lee Kum Hoy were the children of the claimed parents. It further ruled that, while the claimed parentage was possible in the case

of Lee Kum Cherk,[1] his credibility was impeached by the results of the blood tests, since if the other two children were not the children of the alleged parents, he could not be both their brother and the son of the alleged parents (R. 149-151).

On May 11, 1953, the Board of Immigration Appeals, concurring in the findings of the Board of Special Inquiry, dismissed petitioners' appeal (R. 154-160).

On July 13, 1953, Lee Ha the alleged father filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York alleging *inter alia* that although the present petitioners were citizens, they were about to be deported to Communist China; and that they had not had a fair hearing in the exclusion proceedings by virtue of the fact that they had not been allowed to examine the qualifications of the unidentified individuals who conducted the blood tests, or the author of the article on blood tests introduced into evidence (R. 5-9). In an amendment to this petition (R. 9-10) it was also alleged that the blood tests given petitioners were taken without the authority of any statute, rule, or regulation by the Immigration and Naturalization Service, and that such tests were required only of Chinese persons seeking admission and their parents and not of persons of other races (R. 9-10). In a return to the writ the Immigration Service, through its officer Lester Friedman, denied these allegations, and argued

[1] Lee Kum Cherk's name was erroneously transposed with that of Lee Moon Wah in the 13th finding of fact (R. 150) as the Board of Immigration Appeals noted in its subsequent opinion (R. 157).

that since the petitioners were accorded an opportunity to meet the blood test evidence by independent tests their contention that the hearing was unfair was not substantiated (R. 11-19).

On September 17, 1953, the District Court, through Judge Dimock, found after hearing that the petitioners had been denied sufficient opportunity to attack the blood test evidence, and directed that the writ should be sustained unless within 20 days the Board of Special Inquiry reopened the proceedings to afford petitioners this opportunity (R. 36-53; 115 F. Supp. 302).

On November 5, 1953, the Board of Special Inquiry again met, and on consent of the parties the hearing was transferred to a Special Inquiry Officer (R. 162-165). Dr. Sussman, a specialist on hematology (R. 168-169), testified on behalf of petitioners that the tests would exclude paternity of Lee Kum Hoy and Lee Moon Wah only if they were accurately made (R. 180-181). Counsel for petitioner was again given opportunity to conduct independent tests which he declined to do (R. 186-187). The Service then presented one of the transfusionists who had conducted the original blood tests. He testified that the second test had been correctly taken (R. 202). Dr. Cameron, the medical director of the Department of Pathology, United States Public Health Service, identified a circular from the Federal Security Agency entitled "Blood-type Testing on Request of the Immigration and Naturalization Service" dated May 8, 1952, relating to blood type testing of certain United States citizens of Chinese descent by the Public Health Service on behalf of the Immigration Service (R. 210-

211). Dr. Cameron testified that this circular constituted his authority for conducting such tests, and that the Health Service had tested about 200 Chinese persons (R. 212). The Special Inquiry Officer denied petitioners' request that an official of the Immigration Service be produced to testify as to a possible policy of that service to conduct blood tests only in cases involving Chinese applicants (R. 188-189, 222-223).

On December 9, 1953, the Special Inquiry Officer rendered his decision, again finding the petitioners inadmissible (R. 225-236). On April 12, 1954, the Board of Immigration Appeals granted petitioners an opportunity to reopen the record in order to cross-examine Dr. Wiener whose article on blood testing had been introduced in evidence. The Board also incorporated Dr. Wiener's testimony in a similar case as part of the record in this case (R. 237-238). On June 17, 1954, the Board of Immigration Appeals dismissed petitioners' appeal, and in a lengthy opinion (R. 237-273) found that authority existed for the taking of blood tests, and that no racial discrimination was involved in the blood testing (R. 265-270). Noting that petitioner had declined to take advantage of the opportunity to cross-examine Dr. Wiener, the Board ruled that petitioners had offered no satisfactory proof of identity to overcome the blood test evidence introduced by the service (R. 273).

Petitioners again sought release on writ of habeas corpus in the District Court. On August 31, 1954, Judge Dimock rendered a second opinion (R. 55-65; 123 F. Supp. 674) in which he found against peti-

tioners on their claim that immigration authorities (R. 59), "cannot in any case require submission to a blood test as a condition to admission as a child of an American citizen." He held, however, that if such a policy were applied only against persons of Chinese descent that would constitute a denial of due process of law, and he directed that the writ be sustained unless within 20 days the hearing be reopened to determine whether the Immigration Service was practicing discrimination against Chinese persons in giving blood tests where paternity was in issue (R. 63).

On the reopened hearing, Lester Friedman, an attorney-advisor in the office of the District Counsel, New York District, Immigration and Naturalization Service, testified as to service policy with respect to conducting blood tests in exclusion cases. The practice, he said, originated with the State Department when, because of the closing of consulates in Communist China, the Hong Kong consulate was "deluged with thousands of applications" for United States passports by persons claiming citizenship through birth in China to an American father, "almost all of which were predicated upon oral claims of relationship and identity without documentary evidence of a primary or secondary nature" (R. 280). Since almost all such persons were born in the remote interior of China, it was impossible for the consulate to conduct even the most superficial investigation of the claimed identity of these persons.

Mr. Friedman testified that only rarely do American fathers file marriage or birth records at American consulates in China and unlike the case of European

applicants there is very little documentary evidence of paternity available (R. 288-289). The problem is complicated by the fact that the vast majority of passport fraud cases occur among Chinese persons (R. 372-374). Many Chinese applicants have used "coaching books" or "Halgoons", which are extensive written summaries of the entire background of a family with minutely detailed facts concerning the family life, village, neighbors, schooling, and geography of the area where the common home is claimed (R. 369-370). When a Chinese child dies, it is a common practice to substitute another child in his place as an applicant for admission (R. 376).

To meet these problems the State Department enlisted the cooperation of the Public Health Service to conduct blood tests in such cases (R. 280-281, 286-287, 290-291). Thereafter the Immigration and Naturalization Service decided to use similar tests where identity and paternity were in issue. While this policy was established in 1952 or shortly before, because of the unique problem presented by many thousands of Chinese cases, the policy was never intended to extend only to Chinese cases but to every case where such evidence was pertinent to the issues (R. 282). Mr. Friedman testified that (R. 287) "it is the nature of the cases which determines the administrative policy as to the use of blood tests and not the race of the persons concerned."

At the time of petitioner's arrival there were no Service instructions relating to the use of blood tests. It was not until after the decision of the Board of Immigration Appeals in the case of *Lee Fay Fan*

(0300/423162, Feb. 25, 1953), which established the precedent, that instructions were issued relating to the use of blood tests (R. 310-311, 326). While these instructions mentioned the use of such tests in Chinese cases, they did not make the use of such tests exclusive to Chinese. In 1954 new instructions were issued predicating the requirements of blood testing on the nature of the case and the issue of paternity or relationship involved. Such tests now are uniformly requested of all applicants for admission who come here without documentary evidence of any kind and claim derivative citizenship on the basis of oral testimony (R. 291-292, 320-321, 326-327, 333). No special instructions have been issued with regard to the use of blood tests in exclusion hearings (R. 310-311, 327). While such tests have been requested principally in Chinese cases, that is because of the fact that it is in those cases that documentary evidence is lacking and not because of discrimination against Chinese (R. 282, 284, 287, 289-290, 320, 326, 333).[2]

On January 18, 1955, the Special Inquiry Officer found that no discrimination had been practiced in this case or generally. He ordered the applicants excluded from the United States (R. 382-391). On May 5, 1955, an appeal to the Board of Immigration Appeals was dismissed (R. 392-401).

After further consideration of the case in the District Court, Judge Dimock, in an opinion filed on August 8, 1955, (R. 70-77, 133 F. Supp. 850), held that

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[2] Mr. Friedman cited four non-Chinese cases where blood testing had been used, at least two of which, however, involved Negroes (R. 283-284, 349, 356-357).

because of the fact that there had been discrimination in the use of blood tests in Chinese cases, petitioners were entitled to be discharged from custody. In his order, he not only sustained the writ but admitted the petitioners into the United States "as citizens thereof" (R. 116).

The Service took an appeal from this holding, and the petitioners a cross-appeal from Judge Dimock's ruling in his second decision (123 F. Supp. 674) that blood tests, in the absence of discrimination on racial grounds, may be utilized by the Immigration Service without specific statutory authority. In a majority opinion (Pet. 1a-9a) the Court of Appeals, in reversing the judgment below, held as follows (Pet. 7a-8a):

> * * * We overrule the relators' contention, raised by their cross-appeal, that evidence of the blood tests was improperly received because of lack of administrative authority to make use of blood tests. Even in the absence of express authority embodied in official rules or directives, we hold that in the situation here responsible official personnel had authority to utilize any non-discriminatory, investigatory technique reasonably appropriate. The ruling complained of is sustained and the order complained of by the cross-appeal is affirmed.
>
> We hold further that on the entire administrative record, only the salient portions of which are set forth above, the finding below that the testing of these relators was actuated by racial discrimination, was not warranted. It is true that in the 1952-1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any non-Chinese case

> or of Chinese admitted without blood testing. Nevertheless we think it more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult cases. * * *

While Judge Frank concurred in the affirmance on petitioners' cross-appeal, he dissented from the reversal of the District Court's ruling on the discrimination issue (Pet. 10a-16a).

ARGUMENT

1. Petitioners contend that the blood tests, on which the finding against their claim of citizenship rests, were discriminatory in that they were held during a two-year period (1952-1953) during which such tests were given only to persons of Chinese origin (Pet. 7-13). This record establishes, however, that the use of such tests was not directed against Chinese because of their race or color, but because of the particular circumstances in China which created special problems. The use of a special technique to meet a special problem is not unconstitutional discrimination. *Cf. National Labor Relation Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 46.

The special problem happened to relate to Chinese because of the political situation in China and the absence of the kind of records that are normally available for other groups. During the period in question,

with the consulates in Communist China closed, thousands of applicants from remote areas in China were presenting to the consulate in Hong Kong applications for admission to the United States, without travel documents and without records of birth and parentage. It was impossible for consular officials to gain access to the interior areas to investigate the claims. The existence of schemes to prepare claimants on the details of village life, so as to substantiate their claims (see the Statement, *supra,* p. 9) was known. Under these special circumstances, the State Department developed, and the Immigration Service adopted, the policy of requesting blood tests as part of the effort of the applicants to establish their affirmative claim to American citizenship. The policy developed in Chinese cases because the problems which rendered the policy appropriate arose out of the special circumstances of Chinese government and history. The problem of paternity arises rarely as to other groups and never with all the particular difficulties that resulted from the political developments in China.

Under these circumstances this record fails to substantiate petitioners' claim that blood testing in the 1952-1953 period by the Immigration and Naturalization Service was "unjustifiable" or "based solely upon race," or "was, as an unreasonable discrimination, a denial of due process." The conclusion that the policy was not unconstitutionally discriminatory reached by the Court of Appeals in the instant case, and in its prior opinions in *Dong Wing Ott* v. *Shaughnessy,* 220 F. 2d 537, certiorari denied, 350 U.S. 847, and *Lue Chow Kon* v. *Brownell,* 220 F. 2d 187, is amply justified.

2. Petitioners contend also that because no authority was expressly given immigration officials to conduct blood tests either by statute or regulation, the tests in this case were unlawful (Pet. 11-13).

The burden of proof was, however, on petitioners to establish their claim to citizenship, and a request that they submit this proof in support of their claim was reasonable. Petitioners made no objection to taking the tests which were administered as a matter of course (R. 57).

There can be no doubt that blood testing is a valid procedure both under Rule 35 of the Federal Rules of Civil Procedure (*Beach* v. *Beach*, 114 F. 2d 479 (C.A. D.C.), and under the Civil Practice Act of New York, where the exclusion proceeding was held. *Lue Chow Kon* v. *Brownell*, 220 F. 2d 187 (C.A. 2); *Dong Wing Ott* v. *Shaughnessy*, 220 F. 2d 537, 540. The Board of Immigration Appeals in a precedent decision has ruled that blood testing is a proper procedure in exclusion cases of this type. *In the Matter of Lee Fan* (0300/423162, February 25, 1953). While there was no express authority given the Immigration Service to conduct such tests as an investigative technique in this case beyond its general investigative authority, immigration authorities are not bound by the same strict rules of evidence which limit judicial authority or to particular modes of informing themselves as to facts. *Kwong Han Foo* v. *Ward*, 126 F. 2d 615 (C.A. 1); *Jung Yen Loy* v. *Cahill*, 81 F. 2d 809 (C.A. 9); *Berkman* v. *Tillinghast*, 58 F. 2d 621 (C.A. 1); *Gung You* v. *Nagle*, 34 F. 2d 848 (C.A. 9); *Mason ex rel. Lee Wing You* v. *Tillinghast*, 27 F. 2d 580 (C.A. 1);

United States ex rel. Chew Deck v. *Commissioner*, 17 F. Supp. 78 (S.D. N.Y.), affirmed, 86 F. 2d 1020 (C.A. 2), certiorari denied, 300 U.S. 666. This Court has held that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143.

The use of blood tests was a logical method of investigation in the particular circumstances of this case and could not be said to be so unfair as to be violative of the fundamental principles of justice embraced within the conception of due process of law. *Kwong Han Foo* v. *Ward, supra* (126 F. 2d at p. 618).

3. Petitioners also attack the results of the blood tests as unreliable and insufficient to refute their parentage. Blood test evidence as a method of excluding the possibility of parentage is now well established. *Beach* v. *Beach, supra; Lue Chow Kon* v. *Brownell, supra; Wong Fuey Ying* v. *Dulles*, 137 F. Supp. 470, 472 (D. Mass.). As to the reliability of the particular tests or what they proved, petitioners were afforded ample opportunity to refute the evidence in the administrative proceedings and failed to do so. This attack on the mere weight of the evidence does not come within the scope of collateral review. *Eagles* v. *United States*, 329 U.S. 304; *Sunal* v. *Large* 332 U.S. 174.

CONCLUSION

The petition for a writ of certiorari presents no conflict of decision or question meriting further review by this Court. It should therefore be denied.

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Solicitor General.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	12
Argument	18
I. The use of blood-tests in passing on petitioners' claims of derivative citizenship was not discriminatory; the practice was first adopted with respect to Chinese claimants because of the peculiar problems such cases presented	19
A. The number of claims to derivative citizenship by Chinese applicants in 1951 represented a special immediate problem for consular officers in Hong Kong	19
B. The usual techniques of checking claims to derivative citizenship were inadequate for this type of clair	24
C. After blood-testing techniques were found helpful in meeting the problems of identity and paternity in cases which were concentrated in the Hong Kong area, the technique was utilized generally	32
II The use of a special technique to meet a special problem is not unconstitutional discrimination	34
III Even if blood-testing had been erroneously limited, there would be no reason to exclude the evidence in this case	41
Conclusion	41

CITATIONS

Cases:

Bolling v. *Sharpe*, 347 U.S. 497	16, 36
Breithaupt v. *Abram*, 352 U.S. 432	32
Brownell v. *Lee Mon Hong*, 217 F. 2d 113	22
Chin Wing Gwong v. *Dulles*, 139 F. Supp. 116	28
Chow Sing v. *Brownell*, 217 F. 2d 140	22

Cases—Continued

	Page
Detroit Bank v. *United States*, 317 U.S. 329	36
Dong Wing Ott v. *Shaughnessy*, 116 F. Supp. 745, affirmed, 220 F. 2d 537, certiorari denied, 350 U.S. 847	23, 27, 37
Hee Fuk Yuen v. *White*, 273 Fed. 10, certiorari denied, *sub nom. Pang Hing* v. *White*, 257 U.S. 639	38
Hirabayashi v. *United States*, 320 U.S. 81	35, 36
Hom Ark v. *Carr*, 105 F. 2d 607	31
Hurd v. *Hodge*, 334 U.S. 24	36
Hurwitz v. *North*, 271 U.S. 40	34
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61	34
Lue Chow Kon v. *Brownell*, 122 F. Supp. 370, affirmed, 220 F. 2d 187	30, 37
Ly Shew v. *Acheson*, 110 F. Supp. 50, vacated and remanded *sub nom. Ly. Shew* v. *Dulles*, 219 F. 2d 413	23, 25, 28, 29
Ly Shew v. *Dulles*, No. 14,768, June 23, 1956	24
Mah Ying Og v. *McGrath*, 187 F. 2d 199	22, 23
Mar Gong v. *McGranery*, 109 F. Supp. 821, reversed, *sub nom. Mar Gong* v. *Brownell*, 209 F. 2d 448	24, 27
Medeiros, United States ex rel. v. *Watkins*, 166 F. 2d 897	22
Metropolitan Co. v. *Brownell*, 294 U.S. 580	34
Middleton v. *Texas Power & Light Co.*, 249 U.S. 152	34
Miller v. *Wilson*, 236 U.S. 373	34
Missouri v. *Lewis*, 101 U.S. 22	34
National Labor Relations Board v. *Jones & Laughlin*, 301 U.S. 1	16, 34
Quan Hing Sun v. *White*, 254 Fed. 402	42
Satsburg v. *Maryland*, 346 U.S. 545	34
Semler v. *Dental Examiners*, 294 U.S. 608	34
Soo Hoo Yin Deep v. *Dulles*, 116 F. Supp. 25	28
Steele v. *L. & N. R. Co.*, 323 U.S. 192	36
Steward Machine Co. v. *Davis*, 301 U.S. 548	35, 40
Sunshine Coal Co. v. *Adkins*, 310 U.S. 381	35
Thiel v. *Southern Pacific Co.*, 328 U.S. 217	36
United States v. *Ju Toy*, 198 U.S. 253	22
United States v. *Petrillo*, 332 U.S. 1	16, 35, 36, 40
Watson v. *Maryland*, 218 U.S. 173	34

Cases—Continued Page

West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 34
Wong Chong Oy v. *Dulles*, 132 F. Supp. 483 31
Wong Fook Ngoey v. Nagle, 300 Fed. 323 31
Wong Suey Ming v. *Dulles*, 130 F. Supp. 905 28

Constitution and statutes:

Constitution of the United States:
Fourth Amendment 41
Fifth Amendment 15, 34, 35, 36
Fourteenth Amendment 15, 34
Act of May 6, 1882, 22 Stat. 58 21
Act of December 17, 1943, 57 Stat. 600 21
Communications Act of 1934, as amended, Sec. 506(a)(1), 60 Stat. 89 35
Immigration and Nationality Act of 1952, Sec. 360(a), 66 Stat. 273, 8 U.S.C. 1503(a) 22
Nationality Act of 1940, Sec. 503, 54 Stat. 1171, 8 U.S.C. (1946 ed.) 903 ..... 21, 22, 23
R. S. 1993 42
58 Stat. 1125 21

Miscellaneous:

Annual Report of the Attorney General of the United States (1956) pp. 111-113 ..... 29, 30
Briggs, *American Consular Rights in Communist China*, 44 Am. Jour. of Int. Law 243 26
Corwin, *The Constitution of the United States of America*, Senate Document No. 170, 82d Cong., 2d sess. (1953 ed.):
1145-1146 34
1153-1156 34
Manual for Medical Examination of Aliens, issued by United States Public Health Service 38-39
Schatkin, Sussman & Yarbrough, *Blood Test Evidence In Detecting False Claims of Citizenship*, 3 Cr. L. Rev. (Autumn 1956) 45 31-32
Schatkin, Sussman and Yarbrough, *Chinese Immigration and Blood Tests*, 2 Cr. L. Rev. (Spring 1955) 44 ..... 20, 23, 25, 28-29, 30, 31
Tyler, *Immigration and the United States* (1956) 29 21

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

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JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1956. The petition for a writ of certiorari was filed on November 2, 1956, and granted on January 14, 1957 (352 U.S. 966),

limited to the question stated below. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was unconstitutional discrimination against petitioners by the use of blood tests in determination of their application for entry into this country.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals reversing the order of the District Court which had granted a writ of habeas corpus and admitted petitioners to the United States as citizens (R. 115-116).

The evidence and the proceedings in this case may be summarized as follows:

On June 17, 1952, the petitioners, two boys and a girl aged 21, 13, and 12 respectively, arrived in New York from Hong Kong (R. 131, 148, 149). The three claimed to be the children of Lee Ha (an American citizen) and his wife Wong Tew Hee [1] (an alien), to whom the alleged father was married in China in 1923 (R. 149).

The case was referred to a Board of Special Inquiry and a hearing was commenced on August 14, 1952 (R. 123). Petitioners, who were represented by counsel, were informed that the burden was upon them to establish that they were admissible (R. 124).

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[1] Also variously referred to in the proceedings as Tew Hee Wong and Hee Tew Wong.

They testified that they were born in the Toishan District of China (R. 125), and that they had never before been in the United States (R. 131). Lee Ha, the claimed citizen father, and Wong Tew Hee, the alleged mother, testified in support of their claimed relationship to the children and to each other (R. 134, 136). The petitioners and the alleged parents were questioned in detail as to their alleged common home in Lung Woy Village, Toishan District, China (R. 126-130, 134-135, 137).

The immigration inspector introduced into evidence the results of two blood tests taken of the three petitioners and the alleged parents by the United States Public Health Service on two occasions prior to the hearing (R. 131-133, 135, 136). The tests showed that each of the claimed parents was in blood group "A", while Lee Moon Wah, and Lee Kum Hoy were in blood group "B", and Lee Kum Cherk was in blood group "O" (R. 150). The Service inspector also introduced into evidence an article in the United States Law Review entitled "Blood Grouping Tests in the New York Courts" by Alexander S. Wiener, M.D. (R. 137) from which it appeared that, on the basis of the blood test results, the petitioners Lee Moon Wah and Lee Kum Hoy could not be related to the claimed parents (R. 137, 150). Petitioners' counsel objected to the introduction into evidence of both the blood test results and the article by Dr. Wiener (R. 133, 140). A request that Dr. Wiener be produced for cross-examination was denied (R. 140).

Petitioners were, however, granted a continuance

until September 18, 1952, in order that they might have independent blood tests made to meet the evidence adduced by the Service (R. 140-141). On that date petitioners' counsel withdrew his request for independent blood tests and reiterated his request to cross-examine Dr. Wiener, which request was again denied (R. 143-144).

The Board of Special Inquiry then rendered its exclusion order, finding, *inter alia*, that while the oral testimony of the witnesses as to their claimed common home in China was "reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service", the blood tests excluded the possibility that Lee Moon Wah and Lee Kum Hoy were the children of the claimed parents. It further ruled that, while the claimed parentage was possible in the case of Lee Kum Cherk,[2] his credibility was impeached by the results of the blood tests, since if the other two children were not the children of the alleged parents, he could not be both their brother and the son of the alleged parents (R. 149-151).

On May 11, 1953, the Board of Immigration Appeals, concurring in the findings of the Board of Special Inquiry, dismissed petitioners' appeal (R. 154-160).

On July 13, 1953, Lee Ha, the alleged father, filed a petition for a writ of habeas corpus in the United

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[2] Lee Kum Cherk's name was erroneously transposed with that of Lee Moon Wah in the 13th finding of fact (R. 150) as the Board of Immigration Appeals noted in its subsequent opinion (R. 157).

States District Court for the Southern District of New York alleging, *inter alia*, that, although the present petitioners were citizens, they were about to be deported to China; and that they had not had a fair hearing in the exclusion proceedings by virtue of the fact that they had not been allowed to examine the qualifications of the unidentified individuals who conducted the blood tests, or the author of the article on blood tests introduced into evidence (R. 5-9). In an amendment to this petition (R. 9-10) it was also alleged that the blood tests given petitioners were taken without the authority of any statute, rule, or regulation by the Immigration and Naturalization Service, and that such tests were required only of Chinese persons seeking admission and their parents and not of persons of other races (R. 9-10). In a return to the writ, the Immigration and Naturalization Service, through its attorney Lester Friedman, denied these allegations, and argued that since the petitioners were accorded an opportunity to meet the blood test evidence by independent tests their contention that the hearing was unfair was not substantiated (R. 11-19).

On September 17, 1953, the District Court (Judge Dimock) found, after hearing, that the petitioners had been denied sufficient opportunity to attack the blood test evidence, and directed that the writ should be sustained unless within 20 days the Board of Special Inquiry reopened the proceedings to afford petitioners this opportunity (R. 36-53; 115 F. Supp. 302).

On November 5, 1953, the Board of Special In-

quiry again met, and on consent of the parties the hearing was transferred to a Special Inquiry Officer (R. 162-165). Dr. Sussman, a specialist on hematology (R. 168-169), testified on behalf of petitioners that the tests would exclude paternity of Lee Kum Hoy and Lee Moon Wah only if they were accurately made (R. 180-181). Counsel for petitioners was again given opportunity to conduct independent tests which he declined to do (R. 186-187). The Service then presented one of the transfusionists who had conducted the original blood tests. He testified that the second test had been correctly taken (R. 202). Dr. Cameron, the medical director of the Department of Pathology, United States Public Health Service, identified a circular from the Federal Security Agency entitled "Blood-type Testing on Request of the Immigration and Naturalization Service" dated May 8, 1952, relating to blood type testing of certain United States citizens of Chinese descent by the Public Health Service on behalf of the Immigration Service (R. 210-211). Dr. Cameron testified that this circular constituted his authority for conducting such tests, and that the Health Service had tested about 200 Chinese persons (R. 212). The Special Inquiry Officer denied petitioners' request that an official of the Immigration Service be produced to testify as to a possible policy of the Service to conduct blood tests only in cases involving Chinese applicants (R. 188-189, 222-223).

On December 9, 1953, the Special Inquiry Officer rendered his decision, again finding the petitioners inadmissible (R. 225-236). On April 12, 1954, the

Board of Immigration Appeals granted petitioners an opportunity to reopen the record in order to cross-examine Dr. Wiener whose article on blood testing had been introduced in evidence. The Board also incorporated Dr. Wiener's testimony in a similar case as part of the record in this case (R. 237-238). On June 17, 1954, the Board of Immigration Appeals dismissed petitioners' appeal, and in a lengthy opinion (R. 237-273) found that authority existed for the taking of blood tests, and that no racial discrimination was involved in the blood testing (R. 265-270). Noting that petitioners had declined to take advantage of the opportunity to cross-examine Dr. Wiener, the Board ruled that petitioners had offered no satisfactory proof of identity to overcome the blood test evidence introduced by the Service (R. 273).

Petitioners again sought release on writ of habeas corpus in the District Court. On August 31, 1954, Judge Dimock rendered a second opinion (R. 55-65; 123 F. Supp. 674) in which he found against petitioners on their claim that immigration authorities (R. 59) "cannot in any case require submission to a blood test as a condition to admission as a child of an American citizen." He held, however, that if such a policy were applied only against persons of Chinese descent that would constitute a denial of due process of law, and he directed that the writ be sustained unless within 20 days the hearing be reopened to determine whether the Immigration Service was practicing discrimination against Chi-

nese persons in giving blood tests where paternity was in issue (R. 63).

On the reopened hearing, Lester Friedman, an attorney-advisor in the office of the District Counsel, New York District, Immigration and Naturalization Service, testified as to Service policy with respect to conducting blood tests in exclusion cases. The practice, he said, originated with the State Department when, because of the closing of consulates in Communist China, the Hong Kong consulate was "deluged with thousands of applications" for United States passports by persons claiming citizenship through birth in China to an American father, "almost all of which were predicated upon oral claims of relationship and identity without documentary evidence of a primary or secondary nature" (R. 280). Since almost all such persons were born in the remote interior of China, it was impossible for the consulate to conduct even the most superficial investigation of the claimed identity of these persons.

Mr. Friedman testified that only rarely do American fathers file marriage or birth records at American consulates in China and, unlike the case of European applicants, there is very little documentary evidence of paternity available (R. 288-289). The problem is complicated by the fact that the vast majority of passport fraud cases occur among Chinese persons (R. 372-374). Many Chinese applicants have used "coaching books" or "Halgoons", which are extensive written summaries of the entire background of a family with minutely detailed facts concerning the family life, village, neighbors, schooling, and geo-

graphy of the area where the common home is claimed (R. 369-370). When a Chinese child dies, it is a common practice to substitute another child in his place as an applicant for admission (R. 376).

To meet these problems the State Department enlisted the cooperation of the Public Health Service to conduct blood tests in such cases (R. 280-281, 286-287, 290-291). Thereafter, the Immigration and Naturalization Service decided to use similar tests where identity and paternity were in issue. While this policy was established in 1952 or shortly before, because of the unique problem presented by many thousands of Chinese cases, the policy was never intended to extend only to Chinese cases but to every case where such evidence was pertinent to the issues (R. 282). Mr. Friedman testified that (R. 287) "it is the nature of the cases which determines the administrative policy as to the use of blood tests and not the race of the persons concerned."

At the time of petitioners' arrival from Hong Kong in June 1952, there were no Service instructions relating to the use of blood tests. It was not until after the decision of the Board of Immigration Appeals in the case of *Lee Fay Fan* (0300/423162, Feb. 25, 1953), which established the precedent, that instructions were issued relating to the use of blood tests (R. 310-311, 326). While these instructions mentioned the use of such tests in Chinese cases, they did not make the use of such tests exclusive to Chinese. In 1954 new instructions were issued predicating the requirements of blood testing on the nature of the case and the issue of paternity or relationship

involved. Such tests now are uniformly requested of all applicants for admission who come here without documentary evidence of any kind and claim derivative citizenship on the basis of oral testimony (R. 291-292, 320-321, 326-327, 333). No special instructions have been issued with regard to the use of blood tests in exclusion hearings (R. 310-311, 327). While such tests have been requested principally in cases involving Chinese, that is because of the fact that it is in those cases that documentary evidence is lacking and not because of discrimination against Chinese (R. 282, 284, 287, 289-290, 320, 326, 333).[3]

On January 18, 1955, the Special Inquiry Officer found that no discrimination had been practiced in this case or generally. He ordered the applicants excluded from the United States (R. 382-391). On May 5, 1955, an appeal to the Board of Immigration Appeals was dismissed (R. 392-401).

After further consideration of the case in the District Court, Judge Dimock, in an opinion filed on August 8, 1955, (R. 70-77, 133 F. Supp. 850), held that because of the fact that there had been dis-

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[3] Mr. Friedman cited four non-Chinese cases where blood testing had been used (R. 283-284). Petitioners sought to obtain from him the admission that these were Negroes. He did not know (R. 351-352). In further questioning concerning two of the applicants, the following colloquy occurred:

"Q. Do you know whether they were British subjects from the British West Indies? A. Yes, they were.

"Q. Don't you think it likely that they were Negroes? A. It's quite possible judging from the name and the place of birth." (R. 356-357).

crimination in the use of blood tests in Chinese cases, petitioners were entitled to be discharged from custody. In his order, he not only sustained the writ but admitted the petitioners into the United States "as citizens thereof" (R. 116).

The Service took an appeal from this holding, and the petitioners a cross-appeal from Judge Dimock's ruling in his second decision (123 F. Supp. 674) that blood tests, in the absence of discrimination on racial grounds, may be utilized by the Immigration and Naturalization Service without specific statutory authority. In a majority opinion (Pet. 1a-9a) the Court of Appeals, in reversing the judgment below, held as follows (Pet. 7a-8a):

> * * * We overrule the relators' contention, raised by their cross-appeal, that evidence of the blood tests was improperly received because of lack of administrative authority to make use of blood tests. Even in the absence of express authority embodied in official rules or directives, we hold that in the situation here responsible official personnel had authority to utilize any non-discriminatory, investigatory technique reasonably appropriate. The ruling complained of is sustained and the order complained of by the cross-appeal is affirmed.
>
> We hold further that on the entire administrative record, only the salient portions of which are set forth above, the finding below that the testing of these relators was actuated by racial discrimination, was not warranted. It is true that in the 1952-1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any

> non-Chinese case or of Chinese admitted without blood testing. Nevertheless we think it more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult cases. * * *.

While Judge Frank concurred in the affirmance on petitioners' cross-appeal, he dissented from the reversal of the District Court's ruling on the discrimination issue (Pet. 10a-17a).

SUMMARY OF ARGUMENT

I

The use of blood tests in passing on petitioners' claims of derivative citizenship was not discriminatory.

A. The practice was first adopted with respect to Chinese claimants because of the peculiar problems such cases presented.

1. In 1951, almost all the American consulates in China were closed and thousands of Chinese were congregated at Hong Kong asserting claims to derivative American citizenship. The overwhelming majority of these applications were based on oral claims without corroborative documentary evidence; furthermore, the applicants almost uniformly came from the interior of China so that only the most cursory in-

vestigation of their oral assertions would have been possible—and even this was foreclosed by the political climate of the times. It was against this background that the State Department, in the latter part of 1951, initiated, at Hong Kong, the investigatory technique of blood testing to aid in ascertaining the validity of claims to derivative American citizenship.

B. The history of Chinese migration to the United States has given rise to unique problems in establishing the true identity of claimants to derivative citizenship and presented a behavior pattern which permitted easy opportunity for fraud.

1. From 1882 to 1943, most Chinese were completely excluded and all Chinese were barred from becoming naturalized citizens. During this period, it was usual for American male citizens of Chinese descent to go to China, marry there, have children, and then return alone to the United States. The American father would report the birth of his children to the immigration authorities on his return to the United States, and many of the children, especially the sons, later sought admission to the United States.

2. Opportunities for fraud arose because of several factors. The father had either never seen his alleged children, or had seen them only when they were quite young. The applicants, generally coming from rural villages deep in China, not marked on available maps, had no birth certificates nor corroborating documentary identification to support their oral claims. In this respect, the situation radically differed from that of the usual non-Chinese

mitted without blood tests prior to June 6, 1952 (R. 98a-99a). This evidence, belatedly produced by the Service from its files, reenforces the fact that during the period in question all Chinese persons and no white persons were blood tested.

On this record and on the basis of the three administrative hearings Judge Dimock in his third opinion correctly found (R. 71a-72a):

> "It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The Government has been unable to point to a single instance where a white person has been subject to a blood test or a Chinese excused from one."

The court below conceded that "there was evidence of 500 actual cases in which Chinese had been tested and *no evidence* of blood testing in any non-Chinese case or of Chinese admitted without blood testing" (R. 420a, emphasis supplied).

Extensive argument is not necessary or appropriate in this Court to establish the unconstitutionality of a special federal administrative procedure to determine the claims of United States citizenship of persons of Chinese ancestry more strict than the general procedure applicable to persons of all other ancestry. *Jeong Quey How* v. *White*, 258 Fed. 618 (C. C. A. 9); *Quan Hing Gun* v. *White*, 254 Fed. 402 (C. C. A. 9). This is not the first instance in which judicial intervention has been necessary to protect Chinese persons from racial discrimination in the application of

immigration laws and regulations[2] and other laws and regulations.[3]

The petitioners submit that the record incontrovertibly established, as both courts below found, that petitioners were blood tested pursuant to an administrative practice of blood testing all Chinese and no white persons seeking admission to the United States as citizens. The petitioners completely carried their burden of proof on the issue and the respondent failed wholly to support his contention that persons other than Chinese were blood tested, or even that some Chinese were not blood tested during the period in which petitioners were blood tested. These blood tests should be judicially condemned as unconstitutional and the petitioners finally admitted to the United States as citizens on the basis of all the other evidence, concededly sufficient without the disputed blood tests (R. 76a, 149a-150a, 155a),[4] unless the record presents the issue of and establishes a legal justification for blood testing all Chinese and no white persons.

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[2] See *Ly Shew* v. *Dulles*, 219 F. 2d 413 (C. A. 9); *Yuen Boo Ming* v. *United States*, 103 F. 2d 355 (C. A. 9); *Ex parte Tom Toy Tin*, 230 Fed. 747 (N. D. Cal.); *Ex parte Lee Dung Moo*, 230 Fed. 746 (N. D. Cal.).

[3] See *Wong Wing* v. *United States*, 163 U. S. 235 (federal statute providing for condemnation to hard labor without jury trial); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (laundry ordinance); *Wong Wai* v. *Williamson*, 103 Fed. 1 (C. C. N. D. Cal., bubonic plague ordinance); *In re Tiburcio Parrott*, 1 Fed. 481 (C. C. D. Cal., prohibition against employment of Chinese); *Ho Ah Kow* v. *Noonan*, 5 Sawy. 552, 12 Fed. Cas. No. 6546 (C. C. Cal., queue ordinance); *Opinion of the Justices*, 207 Mass. 601 (prohibition against girls and young women patronizing Chinese hotels and restaurants).

[4] Certiorari was not granted upon petitioners' contention that the petitioners' blood tests were inaccurate and conflicting and that any reliance upon them denied petitioners due process of law (Petition 13-15). Such disputed blood tests are properly ignored as a basis for denying United States citizenship. *Lee Wing Hong* v. *Dulles*, 214 F. 2d 753, 759 (C. A. 7).

II.

On the record there was no legal justification for blood testing all Chinese and no white persons.

In view of respondent's contention throughout the case that some white persons were blood tested and that all Chinese were not blood tested during the period involved and the administrative trial and District Court review of that issue of fact it is not entirely clear to petitioners' counsel that any defense of factual justification of blood testing only Chinese, adopted for the first time by the court below, is available to respondent on this record in this Court. Therefore petitioners contend separately (A) that the defense of justification of blood testing only Chinese is not now available to the respondent; (B) that the record does not establish any factual justification and (C) that lack of conscious racial prejudice is no legal justification.

A. *The Issue of Factual Justification for Blood Testing All Chinese and Only Chinese Is Not Presented.*

The factual issue tried administratively and reviewed by the District Court was whether in fact all Chinese and no white persons were blood tested. The respondent first contended that blood tests were required of all applicants, Chinese and non-Chinese, who lacked birth certificates or other documentary proof of paternity (R. 15a, 72a, 332a), and thus tried to prove that blood testing was not restricted to Chinese although respondent's representatives might fairly be charged with knowing otherwise. The petitioners overcame this contention with evidence that all Chinese, including those born in Hong Kong and with birth certificates issued by the British authorities there, were also

blood tested.[5] Confronted with this evidence respondent then claimed that not the absence of documentary proof of paternity but the unavailability of a consular investigation at the place of the applicant's birth was the factor which determined whether a blood test should be given. The testimony of the Government's witness to this effect was also offered to prove that blood tests were not restricted to Chinese although this was not the fact. The petitioners were required to satisfy the burden of proof on the issue whether blood testing was restricted to Chinese or was extended to other persons and were not placed on notice that they were also required to produce evidence on the different issue that if blood testing were restricted to Chinese the practice was legally justified by factual conditions in China or other factual considerations. The testimony of the Government was not offered on the issue of justification although some of the testimony might have been relevant on that issue if it had been involved. In this posture of the record the petitioners submit that the case should be decided solely on the issue whether blood tests were restricted to Chinese and since in fact they were so restricted the blood tests of petitioners should be ruled in-

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[5] Petitioners, denied any access to the records of the Service, were unable to prove specific cases of white persons without birth certificates or other documentary evidence of paternity who were admitted without blood tests, but on this record it is a fair inference that such applicants were admitted without blood tests because the Government failed to show one case of blood testing of a white person prior to January 10, 1955 (R. 96a) after the District Court condemned blood testing of all Chinese aliens alone. Surely not every white applicant from the war disturbed areas of Europe before January 1955 were able to produce birth certificates or similar documents. The respondent's failure and refusal upon demand to produce any evidence of a white person being blood tested during the period in question supports an inference that white persons without documents were admitted without blood tests during that period. If there were reason to blood test white persons after January 10, 1955 surely similar reasons for such blood tests existed between June 1952 and December 1954.

admissible and on that basis the petitioners should be admitted as citizens.

B. *The Record Does Not Establish Any Factual Justification for Blood Testing Only Chinese.*

Even if the testimony offered by the Government to prove that blood testing was not restricted to Chinese be considered by this Court on the different issue whether there is any factual justification for blood testing only Chinese the petitioners submit that no such justification was established. Judge Frank in his dissenting opinion particularly noted (R. 423a) that Judge Dimock had pointed out how the Government kept shifting its position first by claiming that blood tests were required in all cases where there were no birth certificates or other documents of identity, and when this contention was disproved by cases of Chinese who were blood tested notwithstanding their birth certificates then by contending that blood tests were required when the applicants were born in places inaccessible to a consular investigation (R. 72a-74a). The petitioners, however, submitted five cases (Exhs. 27-31 inclusive, R. 402a-413a) of Chinese born in Hong Kong with birth certificates and . cessible for consular investigation who were subjected to blood tests (R. 74a-76a). In each of these cases the parents were married in Hong Kong, the child had never been to China, and there was presented to the American Consul a British marriage certificate of the parents and a contemporaneous birth certificate for the child and the mother and child were living in Hong Kong and the American Consul could and did conduct an extensive investigation. The oldest child blood tested in this case was six years of age and two of the children were less than a year and a half old at the time they were blood tested. Thus the testimony wholly failed to supply any justification in fact for blood testing only Chinese and in fact affirmatively

established that there was no justification and that the blood testing was based on obvious racial discrimination.

It is true that the Government's witness at the last administrative hearing, commencing October 28, 1954, in addition to his principal testimony seeking to establish that blood testing was not restricted to Chinese (R. 282a-283a), entirely discredited on cross-examination (R. 357a-358a, 377a), at the conclusion of his testimony made a general hearsay statement over objection (R. 367a, 369a-370a) referring to some general judicial comments in another case about statistics of fraud in Chinese citizenship cases (R. 372a) and concluded that although the vast proportion of Chinese applicants were admitted as citizens there was a large incidence of fraud in Chinese cases (R. 366a, 373a).[6] Neither the decision of the Special Inquiry Officer (R. 389a-391a) nor the decision of the Board of Immigration Appeals (R. 392a-401a) conceded that only Chinese were blood tested or relied upon this general testimony of the Government attorney as factual justification for blood testing only Chinese. On the contrary the Board of Immigration Appeals concluded its opinion with the statement that "on the issue of racial discrimination, we believe the instant case should be required to stand on its own bottom, not on the study of other cases which may or may not be similar" (R. 400a). Thus it does not appear that any issue of factual justification for blood testing only Chinese was either tried or determined administratively or in the District Court. The Court of Appeals, however, did refer to the Government attorney's general testimony about alleged fraud in other Chinese cases (R. 417-419). The petitioners submit that this general hearsay testimony, even if

[6] *Margong* v. *Brownell*, 109 F. Supp. 821 (N.D. Cal.), reversed 209 F. 2d 448, 453 because of the trial court's reliance upon its experience in cases other than the case on trial.

entitled to any weight at all, did not supply a factual justification for blood testing all Chinese but, at the most, only Chinese without documentary proof of paternity and from areas where a consular investigation could not be conducted. This testimony supplied no factual justification at all for blood testing Chinese born in Hong Kong and possessing trustworthy documentary evidence of paternity and available for and subjected to intensive consular investigation. Thus this testimony wholly fails to justify blood testing all Chinese. Moreover, since the Government throughout the case insisted erroneously that persons other than Chinese were blood tested petitioners never had the opportunity to offer evidence, which would have to come largely from the Service files, of the incidence of fraud in non-Chinese citizenship cases in order to establish that there is no factual basis for treating Chinese differently than other persons on the basis of an alleged greater incidence of fraud. This Court has admonished that any governmental regulation aimed at one race is prima facie unconstitutional and only the most compelling factual circumstances will justify it. *Oyama* v. *California*, 332 U. S. 633. The petitioners submit that any factual justification relied upon by the court below if available at all on this record was wholly insufficient to justify the racially discriminatory practice.

C. *Lack of Conscious Race Prejudice Does Not Validate the Discriminatory Practice.*

The court below approved the practice of blood testing only Chinese, conceded by the court to be established by the evidence (R. 420), not upon any factual justification of the discrimination but rather upon the asserted legal ground that the special treatment of all Chinese was not "actuated by racial discrimination" (R. 419) or by "racial

prejudice" (R. 419-420). The court added that even if occasional prejudice by individual officers of the Service were deemed proved it did not follow that responsible officers "had consciously, in 1952, adopted a discriminatory policy" (R. 421). This Court, however, has repeatedly ruled that racial discrimination once established cannot be condoned because of failure to prove that the officials involved were consciously motivated solely by an odious racial prejudice rather than by some more socially palatable motive. *Hernandez* v. *Texas*, 347 U. S. 475, 482; *Avery* v. *Georgia*, 345 U. S. 559, 562, 563-564; *Patton* v. *Mississippi*, 332 U. S. 463; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 418; *Norris* v. *Alabama*, 294 U. S. 587, 598; *Hill* v. *Texas*, 316 U. S. 400, 401; *Holland* v. *Edwards*, 307 N. Y. 38, 45. These cases establish the rule that if the individual aggrieved proves that persons of one race are subject to discriminatory treatment he is not required to go further and prove an evil state of mind of the Government officials involved. The burden of proof shifts and the officials are required to justify the discrimination. If constitutional protection against racial discrimination is to be meaningful justification cannot be supplied by general statements of good intentions or general disclaimers of racial prejudice. It is submitted that in the instant case no justification has been presented for the proved racially discriminatory practice of blood testing only Chinese and all Chinese and no white persons between June 1952 and December 1954. On the contrary, the evidence that sixty white persons were blood tested between January 10, 1955 and August 4, 1955 (R. 96a-98a) proves that any factual criteria reasonably requiring blood tests apply to white persons as well as to Chinese and that the prior blood testing of all Chinese and no white persons was based not upon the acceptable criteria but solely upon race.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the petitioners should be ordered finally admitted to the United States as citizens on the basis of all the evidence which was favorable to them with the exception of the unconstitutional, conflicting and disputed blood tests. The fact that the Government may have belatedly some years later extended its blood testing procedure to non-Chinese probably as a result of the decision in this case supplies no basis for subjecting petitioners to further administrative hearings (R. 427). The petitioners are entitled to have their citizenship determined on the basis of the valid procedures existing in 1952 at the time of their application for admission and not on the basis of procedures which may have been adopted by the Government several years later.

Respectfully submitted,

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In the usual non-Chinese derivative citizenship case, the parents of the applicants would normally be in close communication with the local American consulate. The claimants would usually reside in the "American colony" and the birth would be known and registered at the consulate. And even where this were not true, documentary proof of the marriage and birth would be readily available. Additionally, there would be a "baptismal certificate, school record, hospital records, medical certificates, census records * * * ", etc. (R. 285-286). Furthermore, an investigation could readily be made in the area where the birth was claimed and investigators could ascertain from friends, neighbors, and local officials the true identity of the child (R. 286).

In Chinese cases, on the other hand, corroborating documentary evidence or field investigation in the locale where birth is claimed is rarely—if at all—available. As already noted, the overwhelming majority of Chinese applicants rely on oral statements. No investigation of the locale would be feasible even under normal conditions since, as we have stated, the applicants generally claim birth in isolated villages not familiar to American authorities, nor listed on any available maps. And all possibility of conducting such an investigation is completely foreclosed by the political climate in China which has forced the closing of American Consulates. See Briggs, *American Consular Rights in Communist China*, 44 Am. Jour. of Int. Law 243.

This inability to check oral claims of paternity and identity through ordinary methods left the State De-

partment and the Immigration and Naturalization Service with only the unsatisfactory and at times unreliable procedure of seeking out discrepancies in the claimant's story and that of his alleged parents. Unwarranted importance might be placed on minor discrepancies, while a carefully rehearsed fraudulent story might succeed. Language differences, complex family relationships, and cultural distinctions have led to confusion.

For example, Chinese ages are not computed as in America, under the occidental calendar, but under a complex lunar calendar. A disproportionate percentage of applicants allege birth on the day of the month corresponding to the number of the month—a date easy to memorize. Report, p. 41, 54-55. There is marked similarity in Chinese homes and villages. The Chinese have several names which may be interchanged or spelled differently on different occasions.[14] Language differences compound the difficulties. Normal methods of testing credibility by the intonation, rapidity, hesitancy and manner of response are foreclosed. And at times the interpreters differ as to what the applicant has said. *Mar Gong* v. *McGranery*, 109 F. Supp. 821, 823-824 (S.D. Cal.), reversed, *sub nom. Mar Gong* v. *Brownell*, 209 F. 2d 448 (C.A. 9); *Dong Wing Ott* v. *Shaughnessy*, 116 F. Supp. 745 (S.D. N.Y.), affirmed, 220 F. 2d 537 (C.A. 2), certiorari denied, 350 U.S. 847; Report, pp. 52-53.

[14] Here, for example, during the service proceedings, petitioner's alleged mother was referred to as Wong Tew Hee, Tew Hee Wong, and Hee Tew Wong. See also Report, pp. 53-54.

The untrustworthiness of the "discrepancy test" to determine the validity of claims to American parentage has been pointed to on numerous occasions. For example, in *Soo Hoo Yin Deep* v. *Dulles*, 116 F. Supp. 25, 26 (D. Mass.), it was observed that "[m]uch of the testimony * * * had to be given through an interpreter. This, of course, adds to the difficulty of assessing the credibility of the witnesses through the manner in which they told their story." And in *Chin Wing Gwong* v. *Dulles*, 139 F. Supp. 116 (D. Rhode Island), the court noted (139 F. Supp. at 117):

> The testimony of each, punctuated as it was by frequent and extended exchanges in Chinese between the witness and interpreter, was at times difficult to understand and unsatisfactory.

See also, *Wong Suey Ming* v. *Dulles*, 130 F. Supp. 905, 907 (D. Mass.). These problems were the same for consular officials in Hong Kong as they subsequently became for the courts.

2. These potentialities for fraud which inhered in the situation were, before 1951, known to have been exploited. The number of male claimants was itself suggestive of fraud. An examination of 354 of the 716 cases arising in the Northern District of California shows that 367 of the claimants were male and only 39 female. Of 317 suits elsewhere in the United States, the ratio was 1215 male to 169 female. *Ly Shew* v. *Acheson*, *supra*, 110 F. Supp. at 56. In another survey of 149 cases involving 1267 Chinese-born applicants for derivative citizenship, the ratio

was 8.05 males to 1.0 females. By comparison, children of Chinese descent, born in the United States, show a ratio of 1.06 males to 1.0 females.[15]

In the Northern District of California alone, between 1947-1950, there were 53 prosecutions against Chinese based on falsified birth certificates or travel documents. *Ly Shew* v. *Acheson*, 110 F. Supp. 50, 56 (N.D. Cal.). While the full extent of the fraud was not developed to the point of prosecution until after the period here involved,[16] the pattern of fraudulent operations was already known by 1951. Cf. Report, pp. 62-77.

As we have noted, Chinese male citizens returning from visits to China, would, upon return, report to the immigration authorities the birth of children in China. There were instances of the putative fathers' reporting the maximum number of children that could have been born and conceived during their visits. The identities so created, called "immigration slots," were then sold through "brokers" to individuals anxious to enter the United States.

These "brokers" run extensive and well organized

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[15] Schatkin, Sussman and Yarbrough, *op. cit.*, 2 Cr. L. Rev. at 51-52.

[16] Grand jury investigations of fraud perpetrated in Chinese cases were held in New York and California in 1956. As a result, 100 declaratory judgment suits were voluntarily dismissed in the Northern District of California, and 30 in the Southern District of New York, by the end of the year. Four indictments were returned in New York in 1956 which, *inter alia*, charged operations of organized rings to bring in Chinese. Annual Report of the Attorney General of the United States (1956) pp. 111-113.

coaching schools in Hong Kong at which purchasers of "slots" are taught, to the minutest detail, the family history of the Chinese-American whose parentage they claim. "Halgoons", family history coaching books (see *Lue Chow Kon* v. *Brownell*, 122 F. Supp. 370, 372 (S.D. N.Y.), affirmed, 220 F. 2d 187 (C.A. 2)), have been sold at great profit.[17] It is reliably reported that for all their services to the applicants the "brokers" have extracted fees averaging $2,000.[18] Thus, a "discrepancy" test of validity, the only technique then available to administrative authorities and the courts, tended to favor the unscrupulous, cleverly trained applicant to the detriment of the honest, confused claimant. It was felt that compatible blood-testing would not only aid in the detection of false claims, but at the same time affirmatively benefit those applicants, who, although without reliable documentary evidence, were asserting valid claims. The adoption of blood-testing amelio-

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[17] Report, pp. 27-34; cf. Schatkin, Sussman & Yarbrough, *op. cit.*, 2 Crim. L. Rev. at 49-51. These authors point out (p. 49) that after the applicants have memorized a family history, they are given four rules:

"(1) always answer, 'I don't know', or 'I don't remember', to any question not covered by the coaching book; (2) never volunteer information; (3) always be as vague as possible; and (4) never, under any circumstances, admit having been coached or assisted."

[18] Schatkin, Sussman & Yarbrough, *op. cit.*, 2 Crim. L. Rev. at 50; Annual Report of the Attorney General of the United States (1956), pp. 111-113. After blood testing techniques were adopted, the "brokers" instituted preliminary blood-testing to choose "parents" for the applicants whose blood types would be compatible with those of the applicants.

rated the difficulties inherent in the discrepancy test by providing some scientific means of evaluating the alleged relationship. And although a blood test compatible with the claimed relationship does not in and of itself establish the claimed relationship, it has been utilized affirmatively, along with other evidence, to hold that the applicants have met their burden of proof. *Wong Chong Oy* v. *Dulles*, 132 F. Supp. 483 (D. Minn.).[19]

The technique was, in fact, shown to be useful in uncovering fraud at least until applicants became sufficiently aware of the test to take precautionary measures to assure compatibility. Blood tests conducted in Hong Kong a few months after this investigatory procedure was adopted by the State Department revealed that 40% of the applicants tested were asserting fraudulent claims.[20] Of 34 families tested in New York City where both the alleged parents were available for blood-testing, approximately 20% of the applicants were excluded, while in 71 families

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[19] Other investigatory techniques, including X-rays, radiological and clinical examinations, have also been employed, primarily in testing the age of the applicants. *E.g.*, *Wong Fook Ngoey* v. *Nagle*, 300 Fed. 323 (C.A. 9); *Hom Ark* v. *Carr*, 105 F. 2d 607 (C.A. 9). In Canada where a like problem exists in determining issues of paternity and identity in Chinese cases, blood testing and X-rays have been employed. Cf. Report pp. 43-47.

[20] Since false relationships can be detected by blood tests in only about 50% of the cases, the number of fraudulent claims was undoubtedly considerably higher. Schatkin, Sussman & Yarbrough, *op. cit.*, 2 Cr. L. Rev. at 50.

where only the alleged father and child were available, there were 8 exclusions.[21]

In short, blood testing in Chinese derivative citizenship cases was not an unconscionable technique developed to meet a non-existent problem. The problem was a real one, and the test technique was an appropriate method of helping to solve it. Cf. *Breithaupt* v. *Abram*, 352 U.S. 432, 435-437.

C. ***After blood-testing techniques were found helpful in meeting the problems of identity and paternity in cases which were concentrated in the Hong Kong area, the technique was utilized generally.***

The State Department started to use blood tests in the Hong Kong area in 1951. The Immigration and Naturalization Service first commenced blood testing, in cooperation with the State Department, in 1952. In 1953, the Service itself adopted the practice, and used it primarily in cases involving Chinese applicants for certificates of derivative citizenship where paternity and identity were in doubt. As pointed out in the Statement, *supra*, p. 9, at the time petitioners were tested (July and August, 1952) there were no Service instructions relating to blood-testing. Thereafter, instructions in visa petition cases were issued which referred specifically to Chinese but did not limit the tests to Chinese applicants. In 1954, new instructions were adopted predicating blood-testing on the nature of the case and the issue of

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[21] Schatkin, Sussman & Yarbrough, *Blood Test Evidence In Detecting False Claims of Citizenship*, 3 Cr. L. Rev. (Autumn 1956) 45, 46; Cf. Report, pp. 62-77.

paternity or relationship involved. No special instructions were ever issued as to exclusion proceedings (*supra*, p. 10).

Since 1953, and continuing to date, the State Department has authorized its consulates throughout the world to utilize blood-testing where deemed necessary to solve doubtful issues of paternity and identity, regardless of the applicant's race (R. 101). The Immigration and Naturalization Service also expanded use of blood-testing so that within two years of its adoption it was to be applied in every case, irrespective of race, wherever deemed necessary. In 1955, the Service blood-tested about 60 non-Chinese of wide divergence in race and national origin where the nature of the case made such action appropriate (R. 93, 96-98).

When petitioners were tested, blood-testing was a newly adopted technique developed with respect to Chinese cases but not exclusively limited to such cases. Lester Friedman—at that time, attorney-advisor to the Immigration & Naturalization Service who "* * * had had first-hand knowledge of all policy decisions and had participated in thousands of litigated cases * * *" (237 F. 2d at 310)—testified at the Service hearings in this case that blood-testing was never intended to be a tool for racial discrimination. He further noted that, during the period 1952-1954, blood-testing was applied in at least four non-Chinese cases—two in New York and two in Los Angles (see the Statement, *supra* p. 10, n. 3).

II

The Use of a Special Technique To Meet a Special Problem Is Not Unconstitutional Discrimination.

1. It is well settled that legislation reasonably directed at correcting a particular problem is not violative of the equal protection clause of the Fourteenth Amendment even though such legislation is specifically limited to a particular group or class. The test is whether the legislation hits at an evil within the police power of the state to correct.[22] And certainly the due process clause of the Fifth Amendment—under which the instant claim is to be decided—is at least equally as tolerant of reasonable Congressional classification. In *National Labor Relations Board* v. *Jones & Laughlin*, 301 U.S. 1, 46, this Court observed:

> We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. [Citations omitted.]

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[22] See, *e.g.*, *Salsburg* v. *Maryland*, 346 U.S. 545, 551; *Middleton* v. *Texas Power & Light Co.*, 249 U.S. 152, 157-158; *Miller* v. *Wilson*, 236 U.S. 373, 383-384; *Semler* v. *Dental Examiners*, 294 U.S. 608, 610-611; *Hurwitz* v. *North*, 271 U.S. 40; *Watson* v. *Maryland*, 218 U.S. 173, 179-180; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79; *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584; *Missouri* v. *Lewis*, 101 U.S. 22, 31; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400; Corwin, *The Constitution of the United States of America*, Senate Document No. 170, 82d Cong., 2d sess. (1953 ed.), pp. 1145-1146, 1153-1156, n. 2.

And, in *United States* v. *Petrillo*, 332 U.S. 1, the Court specifically rejected the argument that Section 506(a)(1) of the Communications Act violated the due process clause of the Fifth Amendment in that such legislation only applied to broadcasting employees. Mr. Justice Black, speaking for the Court, stated (332 U.S. at 8-9):

> * * * Secondly, it is argued, the Act violates due process because it singles out broadcasting employees for regulation while leaving other classes of employees free to engage in the very practices forbidden to radio workers. But it is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. * * * Nor could we strike down such legislation, even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area. Here Congress aimed its law directly against one practice—compelling a broadcasting company to hire unneeded workers. There is nothing novel about laws to prohibit some persons from compelling other persons to act contrary to their desires. Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, see *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attacked.

See, also, *Hirabayashi* v. *United States*, 320 U.S. 81, 100; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-585; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381,

401; *Detroit Bank* v. *United States*, 317 U.S. 329, 337-338.

2. Undoubtedly, even though the Fifth Amendment has no equal protection clause, grossly discriminatory legislation or grossly discriminative administrative action, especially if predicated on racial grounds, would violate federal due process. *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *Hirabayashi* v. *United States*, 320 U.S. 81, 100; *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 202; *Hurd* v. *Hodge*, 334 U.S. 24, 30; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. But there was no discrimination on racial grounds, as such, in this instance. The use of blood-testing techniques first developed in Chinese cases in the Hong Kong area because the problem was concentrated there. It was first used in this country in Chinese cases because of the same problems, and because by the time its usefulness was realized, a number of applicants presenting those problems had already arrived in this country. Just as it is erroneous to argue that " * * * because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power." *United States* v. *Petrillo*, 332 U.S. 1, 8, it is invalid to strike down blood-testing in Chinese cases because it might have been—but was not—immediately adopted in non-Chinese cases. An evil may be dealt with " * * * where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States*, 320 U.S. 81, 100. So here, blood-testing was utilized to deal with a critical problem and its validity does not depend on its further extension to other areas.

On two prior occasions the Second Circuit rejected the argument that blood testing of Chinese is unconstitutional discrimination. *Dong Wing Ott* v. *Shaughnessy*, 220 F. 2d 537, certiorari denied, 350 U.S. 847; *Lue Chow Kon* v. *Brownell*, 220 F. 2d 187.

In *Dong Wing Ott*, the Court observed (220 F. 2d at 540):

> Such a classification based on the lack of reliable written governmental records of birth and parentage, difficulty of access to the areas from which the claimed family groups come, and long absences from the family group of the citizen father who is an identifying witness, are circumstances justifying the distinction as one not based on race or color.

Also in *Lue Chow Kon*, the court pointed out, that even if it were established "* * * that the tests were given only to Chinese * * *, it would not in itself show that discrimination was based on race or color. The conditions in China during the period in question posed such great obstacles to investigation by ordinary means into family history and evidence of parentage that resort to the tests to aid in determination of parentage or non-parentage of persons from the area is an entirely reasonable requirement" (220 F. 2d at 190).

The mere fact that members of a particular group or persons coming from a particular geographical area may be subjected to tests which are not given to others should not, in and of itself, render the testing unconstitutional. For example, it could not validly be contended that subjecting susceptible appli-

cants for admission to the United States to tests designed to detect the presence of dangerous diseases would violate due process unless such tests were also given to persons not likely to be so infected. Thus, in *Hee Fuk Yuen* v. *White*, 273 Fed. 10 (C. A. 9), certiorari denied, *sub nom. Pang Hing* v. *White*, 257 U. S. 639-640, Chinese merchants (not within the exclusion Acts) were denied reentry into the United States because physical examinations revealed that they were suffering from clonorchiasis—a dangerous contagious disease. They challenged, *inter alia*, the fact that they were compelled to undergo physical examination while non-Chinese, first class cabin passengers, were not similarly required to undergo physical examinations. In rejecting the charge of discrimination, the court said (273 Fed. at 14-15):

> * * * if special examination was made of second class Oriental passengers only, it should be assumed that it was done for the reason that the disease of clonorchiasis was most likely to be found among such passengers, the source of the disease being supposed to be a diet of raw fish, and it should be assumed that in failing to subject first-class passengers to like test there was no discrimination against Chinese persons, or withholding of their rights. The officers presumably did their duty in subjecting the petitioners to the test. *If they failed to do their duty as to other passengers, it is not a ground for disturbing the conclusions of the board of special inquiry as to the appellants.* [Emphasis added]

The Manual for Medical Examination of Aliens, issued by the United States Public Health Service,

provides that special tests to determine the presence of amebic dysentery, a dangerous contagious disease, shall be required " * * * of all persons from rural areas of countries such as Japan and Greece where the disease is common." (Page 9-2). Surely a person excluded because medical examination detected the presence of the contagious disease is not deprived of due process because persons coming from areas where the disease is not prevalent are not also subjected to like tests. In this case, as in those relating to medical problems of a particular area, scientific tests have been employed to meet peculiar problems. In neither case is the specialized treatment motivated by racial or national prejudice; in neither case should the testing, even if limited to one group, be considered unconstitutional.

3. The District Court concluded that because four Chinese applicants from Hong Kong were blood-tested, even though they had birth certificates or normal field investigations to establish their identity were possible or had been conducted, the entire Chinese blood testing program, at the time petitioners were tested, was motivated by racial discrimination. (133 F. Supp. at 852-853).

Four isolated cases provide no basis for a finding of a purposeful policy of racial discrimination.[23] Available statistics show that in the same period a significant number of Chinese applicants for derivative citizenship were never blood-tested. Of 124 Chinese cases arising from March 1, 1952, through Sep-

[23] Mr. Friedman testified that the overwhelming proportion of Chinese applicants are admitted to the United States (R. 373-375).

tember 30, 1952 (petitioners were tested in July and August 1952), the Immigration and Naturalization Service blood-tested only 84; 40 were admitted to the United States after a preliminary inspection, or after hearing before a Board of Special Inquiry (R. 94). And of 6,000 passports issued to Chinese by the State Department from August 1952 through August 1955, only 850 of the applicants were required to undergo blood tests (R. 101). Apart from this, since the technique of blood-testing originated in the Chinese cases, it is quite understandable that local officers might, as a precautionary measure, blood-test applicants even though they had birth certificates. Even if a birth certificate were valid in all respects, it might not belong to the person presenting it (R. 284-286). In any event, four isolated cases hardly establish an conscious prejudice at the policy making level. An overabundance of caution, or even mistaken action by local officials in a few cases, cannot properly be held out as indicia of an overall administrative policy to discriminate against Chinese because of color or race.

Congress did not arbitrarily discriminate against radio workers when it singled out broadcasting as needing protection from feather-bedding—a practice known in other fields. *United States* v. *Petrillo*, 332 U. S. 1. It did not unconstitutionally discriminate against non-agricultural employees when agricultural workers were exempt from the social security tax. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585. So here, the administrators were not unconstitutionally discriminating against Chinese when they first devel-

oped a technique to meet a particular problem which, for all the reasons discussed *supra*, was most acute in Chinese cases.

III

Even If Blood Testing Had Been Erroneously Limited, There Would Be No Reason To Exclude the Evidence In This Case.

Even if it be assumed *arguendo* that the administrative agencies at one time erroneously utilized blood tests within a group which was more limited than it should have been, that does not seem to us a reason to exclude the evidence in this case. This Court, by its limited grant of certiorari, has left undisturbed the ruling of the court below that the administrative authorities are justified in using blood testing techniques in exclusion cases when paternity is in doubt. Petitioners' argument is that, if the technique was discriminatorily used, the evidence obtained thereby should be excluded, not because it is untrustworthy, but because the court should not receive it. Judge Frank, in his dissent below, explicitly drew the analogy to evidence excluded because obtained by an unlawful search-and-seizure.

1. Applying an exclusionary rule to these cases would extend such rule beyond its development in other fields, including criminal cases. In the Fourth Amendment and confession cases, evidence is excluded where, looking solely to the facts of the particular case, there is found to have been a direct violation of an existing personal right of the defendant. A truly analogous case would be one where the *validity* of the search itself is not in issue but the defendant

asserts its invalidity on the sole ground that in another, comparable case, no search had been made, thus allowing another guilty person to go free. In such a case the exclusionary rule should not be invoked because the defendant would not be asserting violation of a personal right but would be basing his claim on an error in another case. And surely, the facts of this case do not call for a new and broad application of the exclusionary rule, extending it so that evidence would be excluded even though there was no defect in the particular proceeding by which the evidence was obtained.

This is not a case where persons of Chinese descent, although qualified as American citizens, were denied entry on an arbitrary basis. It is a case where non-qualified Chinese were denied entry on the basis of evidence whose invalidity arises at most only from the fact that similar techniques were not employed against others. We do not permit a defendant to escape punishment because another person should also have been prosecuted. All the more reason that petitioners should not affirmatively be allowed to obtain rights they do not have because some other persons should also perhaps have been excluded.[24]

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[24] In *Quan Hing Sun* v. *White*, 254 Fed. 402 (C.A. 9), in addition to procedural defects in the administrative hearing, the court found that the claimant might well have been denied entry as the son of an American citizen whether or not he had established his rights pursuant to R.S. 1993, because of the unrelated and arbitrary administrative requirement that he prove himself to be a dependent member of the household of his American parent as a condition precedent to his admission as the son of an American citizen. In

2. If the rule of exclusion of evidence were regarded as a means of disciplining government officials, irrespective of the personal rights of the petitioners, there would still be no occasion to apply it here. Even if it be assumed that the State Department and the immigration authorities used blood tests only in Chinese cases in the inception of the practice, and that this was error, it was at most an error of judgment arising out of the special circumstances which existed in Hong Kong. Any such limitation was abandoned by the State Department by 1953 within two years after the technique was first used and in 1955 by the Immigration Service. There would thus be no occasion for this Court, under its power to fashion rules of evidence, to extend the rule of exclusion to this situation and to exclude probative evidence, obtained without violation of any of petitioners' personal rights, in a way which would confer upon petitioners citizenship which they do not possess and to which they are not entitled.

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contrast to this case, the claimant there might have had a right as an American citizen which was being denied because of a requirement unrelated to citizenship.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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